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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ARSENIO D. MADERO, JR., et al., Plaintiffs and Respondents, v. MERCEDES DEVONEY BROUGHTON, Defendant and Appellant.	E066786 (Super.Ct.No. CIVNS1200020) OPINION

APPEAL from the Superior Court of San Bernardino County. Donald R. Alvarez, Judge. Affirmed.

MacDonald & Cody, Scott L. Macdonald and Erin M. Davis for Defendant and Appellant.

Law Offices of Martin N. Buchanan, Martin N. Buchanan; Girardi Keese and Christopher T. Aumais for Plaintiffs and Respondents.

Defendant and appellant Mercedes Devoney Broughton appeals from a judgment entered against her after trial, where she was ordered to pay damages in excess of three

million dollars. The award stemmed from a car accident where Broughton crossed the double yellow center line of the two-lane State Route 62 (SR-62) in Rice, California and hit a minivan driven by Eloisa Madero. Also in the minivan with Eloisa[1] was the Madero's son JC; the Madero's 16-year-old daughter DJ; Eloisa's sister, Angela Baca; and DJ's boyfriend, Oscar Salas. The minivan rolled over several times until it came to rest on its roof. DJ died instantly and Eloisa suffered major injuries.

The Maderos filed a lawsuit on behalf of themselves and as the parents of DJ. A jury found Broughton was negligent and that her negligence caused the death of DJ and injuries to Eloisa; it awarded the Maderos $3,551,037.84.

Broughton presents the following issues on appeal: (1) the trial court erred by refusing to instruct the jury on the contributory negligence of Eloisa in failing to brake prior to the crash; and (2) the trial court erroneously instructed the jury with the Maderos' special instruction on the import of her guilty plea to misdemeanor vehicular manslaughter.

FACTUAL AND PROCEDURAL HISTORY

A. PROCEDURAL HISTORY

On April 24, 2012, Arsenio, individually and as the successor in interest of DJ (deceased); Eloisa, as an individual and as a successor in interest to DJ; and JC; filed a

[1] We collectively refer to plaintiffs and respondents Eloisa Madero and her husband, Arsenio D. Madero, Jr., as the Maderos. When referring to their children or the Maderos individually we refer to them by their first names. We do this for ease of reference; no disrespect is intended.

complaint against Broughton.[2] The causes of action were negligence, battery, negligent infliction of emotional distress and survival action. On October 19, 2012, a first amended complaint was filed with the same causes of action and parties. On May 12, 2014, JC was dismissed from the case. On February 2, 2016, prior to the case going to the jury, the causes of action for battery, negligent infliction of emotional distress and survivor action were dismissed.

On February 4, 2016, the jury reached its verdict. It found Broughton was negligent and that her negligence was a substantial factor in causing harm to the Maderos. Then jury awarded the Maderos $3,551,037.84. Judgment was entered on April 8, 2016.

On July 7, 2016, Broughton filed a motion for new trial contending, among other things, that the trial court erred by eliminating an instruction to the jury on contributory negligence, and by erroneously instructing the jury on the import of her guilty plea to misdemeanor vehicular manslaughter in a criminal proceeding. Her motion for new trial was denied. Broughton filed her notice of appeal on September 6, 2016.

[2] Broughton's husband was also named in the complaint but was only a passenger in the car. He was dismissed prior to trial.

B. FACTUAL HISTORY[3]

1. *PLAINTIFF'S CASE*

a. The Accident

Eloisa was a special education assistant employed by the Corona Norco School District. The Maderos had been married for 29 years and lived in Riverside. They had three children: JC, CJ and DJ. DJ was born August 20, 1994. She had a boyfriend, Salas, who was 18 years old at the time of the accident. They were a very close family who liked to go to the Colorado River and were in a Christian band together. Eloisa and DJ were very close.

On the day of the accident, July 6, 2011, Eloisa was driving their minivan to the Colorado River to celebrate the Fourth of July. They were meeting her older daughter and Arsenio at the river. Her family frequently drove to the river along SR-62; she estimated she had driven the road 16 or 17 times. She had no previous accidents or speeding tickets while driving on SR-62.

Eloisa did not remember anything about the accident. She had one recollection—that they stopped for food on the way to the river—but recalled nothing else of that day. She never regained her memory of the accident. The next thing she remembered was waking up in the hospital.

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[3] The Maderos introduced evidence of their background, DJ's background, Eloisa's future medical needs, and the injuries incurred as a result of the crash. On appeal, Broughton does not raise any issues as to the amount or calculation of the damages award. As such, we will not provide a detailed statement of facts that includes evidence introduced to the jury for the purpose of determining the damages award.

Salas and DJ had been dating for two years prior to the accident. When they left the house on the day of the accident, around 8:00 a.m., everyone put on their seatbelts. They got food at a drive-thru but they kept their seatbelts on. Salas had ridden in a vehicle with DJ over 100 times and each time she wore her seatbelt. He had been with Eloisa in the car many times. She was a careful driver.

On the day of the accident, Eloisa was not speeding. At the time of the crash, everyone was wearing their seatbelt; Salas had a clear view of DJ because he was in the third-row backseat. Salas saw Broughton's 2005 Chevy Impala coming toward them. It was not clear if Salas saw Broughton's tires leave the roadway and then come back. He could feel the minivan start to slow when Broughton's vehicle was approaching. He estimated that Eloisa was driving 50 mph when the impact occurred. Eloisa tried to go off to the right but she did not have enough time to get out of the way. There was a violent collision and the minivan rolled over an unknown number of times. When the minivan stopped on its roof, Salas called for DJ but she did not respond.

Salas was able to unbuckle his seatbelt and climbed out the window. JC screamed for help and Salas got him out of the minivan. Salas then went to DJ and unbuckled her seatbelt. The minivan was "demolished" on the side where DJ was sitting. Salas and JC removed DJ from the minivan and laid her on the ground. Salas performed CPR on DJ for approximately 30 minutes but she had already died. Eloisa was unconscious.

Baca was in the front passenger seat of the minivan. She was certain DJ was wearing her seatbelt at the time of the crash. She checked to make sure they were all wearing their seatbelts. Baca looked up and saw Broughton's car coming toward them.

When Eloisa saw the car, she took her foot off the gas and swerved to pull over. She knew that Eloisa took her foot off the gas because she "felt it in the car." She thought that Eloisa was driving under 65 mph; she estimated between 55 and 60 mph. She did not know if Eloisa applied the brakes, but Baca did feel that Eloisa had taken her foot off the gas and tried to pull over to the side. Eloisa physically moved the steering wheel to the right. Baca performed CPR on DJ.

JC was sitting behind Baca in the minivan. He was 18 years old at the time of the accident. He did not recall if Eloisa tried to avoid the crash. He helped Salas pull DJ from the minivan.

California Highway Patrol (CHP) Officer Richard Schwemmer was the first to respond to the scene of the accident on SR-62. He observed two vehicles. One was off the road and another was blocking the eastbound lane. There was a large debris field and many people standing near the vehicles. Broughton was driving an Impala; her husband was in the passenger's seat. They reported no major injuries and were coherent.

Officer Schwemmer then approached the Maderos' minivan. A man and a woman, who reported they were off-duty paramedics, were attending to Eloisa, who was on the ground. The off-duty paramedics told Officer Schwemmer there was a female on the other side of the vehicle but she had died. They had worked on her for 10 minutes but could not revive her. It took approximately 30 minutes for an ambulance and fire trucks to arrive. The state of the vehicles was indicative to Officer Schwemmer of a head-on collision. It appeared to be a violent crash.

CHP Officer Mathew Praznik responded to the accident scene. He prepared a traffic collision report. The accident occurred in a desert area that was somewhat desolate. SR-62 was a two-lane highway with no median. The maximum speed limit was 65 miles per hour (mph). There were shoulders on each side of the highway. Where the crash occurred, there was a double solid yellow line.

The crash occurred at mile marker 104 at approximately 1:45 p.m. There were railroad tracks across the highway at mile marker 99. From those railroad tracks traveling west (the direction Broughton was traveling) from mile marker 99, the road would veer slightly to the right and then there was a straightaway. The area where the accident occurred, the road curved to the left as one travelled west.

The Impala driven by Broughton did not appear to have any mechanical defects or problems prior to the accident. There were no tire abnormalities. Wind and visibility were not factors in the accident. A majority of the damage on Broughton's vehicle was on the front end and the left side. On the Maderos' vehicle, there was front-end damage, damage along the entire left side of the vehicle and the top was crushed due to the rollover. The minivan was on its roof facing in a northerly direction south of SR-62. There were no defects in the seatbelts. DJ's seat was twisted counterclockwise. All of the seatbelts had some sort of abrasions and stretching, which made them appear to have been fastened on the occupants of the minivan at the time of the crash.

Officer Praznik took several photographs of the cars at the scene and after they were towed. The photographs were shown to the jury. In his collision report, he indicated that DJ was wearing a seatbelt. DJ was not ejected from the vehicle.

Officer Praznik spoke to the occupants of the minivan. Baca, who had been sitting in the passenger's seat, complained of head and chest pain. She had on a seatbelt and was not ejected. JC had been sitting behind Baca in the second row. JC complained of pain in his left side. Salas had been sitting in the third row behind JC. He complained of pain in his right leg and side. Eloisa was not ejected from the vehicle and had been wearing her seatbelt. She complained of pain throughout most of her body. All of the individuals who had been in the Maderos' vehicle were distraught and in shock.

Salas told Officer Praznik that they packed the car that morning and started driving to the river. DJ was wearing her seatbelt and nothing unusual happened up to the time of the crash. Baca estimated that Eloisa was driving 65 mph prior to the accident. Baca observed Broughton's vehicle go off the dirt shoulder. It then came back onto the roadway and headed for their vehicle. Eloisa made an evasive maneuver to the right to try to avoid the collision. Salas believed there was nothing that Eloisa could have done to avoid the collision.

At the time of the accident, JC was sitting in the second row of the minivan playing a handheld video game system. He looked over and DJ was sleeping. He then looked forward and saw Broughton's car headed directly for them. Eloisa said something to the effect of what was this other driver doing. JC indicated that Broughton's car was coming "very fast" at them.

Officer Praznik interviewed Broughton at the scene. On the day of the accident she and her husband were traveling from their residence in Laughlin to their home in Southern California. She had gone to bed the prior night around midnight. At the time of

the impact, she claimed to have been driving between 55 to 60 mph. Broughton's husband confirmed the speed. Just prior to the collision, Broughton explained she felt something grab at the vehicle tires. She did not mention train tracks, an animal in the rode or a defect in her vehicle.

Officer Praznik explained that SR-62 was "crowned" in the middle and then gradually sloped down to keep water off the roadway. No one reported Eloisa braking prior to the collision. Officer Praznik indicated that an accident wherein both cars are traveling at 65 mph and collide would result in a violent crash.

CHP Officer Jeremiah McCorkle was a traffic officer based in Needles. He responded to the accident. He created a factual diagram of the scene. He used a Rolometer and his vehicle's odometer to take measurements. He observed tire marks and points of rest of the vehicles. He prepared a diagram of the vehicles' movements based on the evidence at the scene.

On the shoulder side of SR-62, there was a solid white line; the middle had a double yellow line. The measurements were accurate to the best of his knowledge. The two double lines were about one foot across, the lanes were 12 feet, and the distance between the white lines and the shoulder was three feet. He did not detect any preimpact skid marks for the Maderos' vehicle but there were numerous skid marks in the area of the collision.

Officer Praznik explained vehicles have black boxes that track speed, braking and acceleration. He did not look at the black box in Broughton's vehicle. Based on his training and experience, the black box information was reliable.

b. Injuries

Dr. Andrew James Fragen was working as trauma acute care surgeon in the hospital where Eloisa was brought after the accident. Eloisa's foot was in pieces. She had fractures in her back, pelvis area and ribs. She had a collapsed lung. She had a concussion. She had abrasions on her neck consistent with wearing a seatbelt during the crash.

When Eloisa woke up in the hospital she was in a lot of pain. It was not until she left the hospital and started rehabilitation that she became aware that DJ had died in the accident. She had a broken foot, pelvis, tailbone and broken ribs. She had a back injury. Her hip was the most painful injury and the pain lasted for months after the accident. Eloisa's foot continued to bother her if she walked on it a lot and she had nerve damage on the side of her foot. If she was hit on the foot, it was very painful. She could no longer take long hikes. She still had pain in her pelvis and back.

Eloisa was in a wheelchair following the accident. She experienced memory problems after the accident. She was limited in the amount of housework she could complete as she would suffer pain. She was unable to lift band equipment for her family's band. She had trouble picking up her grandchildren, and the children at work. She was very nervous driving. She tried to hide her depression. She felt guilty when she tried to do something fun. Eloisa and her family never returned to the Colorado River. Eloisa continued to walk with a limp.

The chief medical examiner of the San Bernardino County Sheriff's Department performed an autopsy on DJ on July 14, 2011. DJ's left arm had been fractured. There

was a complete separation of her spine from the back of her head. The spinal cord was severed. She had several rib fractures. There was severe tearing of her heart. DJ died as a result of blunt force injuries suffered during the car crash. She would have died almost instantly based on the injuries to her heart. Her liver and spleen were injured. Her breastplate and ribs were broken. Her injuries were consistent with compression, which meant that the parts of the interior of the vehicle hit her on the front and back.

c. Accident Reconstruction

Joseph Manning was an expert consultant on traffic accident reconstruction. He was retained by the Maderos; he had previously testified in court equally for both plaintiffs and defendants. He recovered the black box from Broughton's car. He explained that the black box controlled whether the airbags were deployed. It kept track of acceleration and deacceleration. That information was capable of being extracted after a collision.

The Maderos' vehicle also had a black box but "for that year vehicle . . . the manufactur[er] didn't have any information to be extracted and read." The front airbags in the minivan did not deploy because the crash mostly involved the side of the minivan; there were no side airbags. Manning had personally inspected the vehicles and visited the scene of the accident.

The black box indicated that Broughton was wearing her seatbelt. The airbags deployed and the data froze at that time. There was no indication from the black box that the tires came off the ground before the crash. According to the black box, five seconds prior to the crash the vehicle was traveling 76 mph. It changed to 75 mph two seconds

prior to the crash. One second prior to the crash the black box showed that Broughton's vehicle was traveling at 71 mph. Manning estimated Broughton was traveling at 76 mph when her right tire went off the road. Within the eight seconds prior to the crash, the brakes were not used.

Broughton's vehicle went into a spin after the impact. He estimated the minivan rolled over one and one-half times. The evidence supported that Eloisa was steering the minivan to the right to try to avoid the collision. Manning saw no evidence that Broughton left the roadway due to a sudden emergency. The closest railroad tracks were over three miles away. Manning believed, from inspecting DJ's seatbelt, that she was wearing it during the crash.

Manning estimated, based on Broughton's speed of 71 to 76 mph, there would have been 1.3 seconds from the time that Broughton corrected going off the road until she impacted the minivan. If she had been traveling at 65 mph, the time would be 1.6 seconds. Eloisa had just over a second to decide to steer away or brake; she chose to try to steer away. He admitted that if Broughton was going slower, it could have given Eloisa more time to brake.

Manning assumed the speed of the minivan was 65 mph because that was what the traffic collision report indicated, and there was no contradictory information. Broughton told the police she was going 55 to 60 mph at the time of the crash but the black box indicated 71 to 75 mph. The reaction time for when a person saw a possible hazard was 1.5 seconds. Manning explained that at 1.3 seconds, Broughton was off the road and was

not a perceived hazard. Her crossing the double yellow line occurred after that so Eloisa's reaction time was actually shorter.

Manning was aware that Eloisa may have seen Broughton off the road because she said what is that lady doing. However, it was not clear to Manning what the hazard was at that time and if at that time Eloisa should have been expected to brake. Manning believed that once Broughton veered off the roadway, she quickly moved the car back onto the roadway by steering left, which caused the car to enter the other lane. Manning had "100 percent" confidence in the black box data.

In Manning's opinion, Eloisa tried to make an evasive maneuver by steering to the right. The quicker a person had to make a decision, the more automatic the response would be. There were statements by witnesses that Eloisa slowed down but there were no skid marks or physical evidence on the roadway that she braked. She may have had time to brake but her response was automatic and she tried to veer to the right.

Broughton could have slowly moved her car back onto the roadway but she aggressively turned to the left. She also could have just slowed down.

d. Broughton's Testimony[4]

Broughton testified that the day of the accident was clear and dry. She was on her way to Redondo Beach. She had previously driven the same way on SR-62 three or four times. She accelerated out of the turn on the road prior to going off the road. She was going over 50 mph but she was not sure of her speed. Her front passenger's right tire

[4] The Maderos called Broughton to testify under Evidence Code section 776.

went off of the road. She drove over train tracks and then into the curve. She could not recall the distance between the tracks and the curve. As she came out of the curve, she saw the Maderos' vehicle coming towards her. She was told that she crossed a double yellow line but she had no recollection of that occurring; she recalled that she was spinning prior to impacting the minivan.

Broughton, at the time, did not believe that she was speeding but now knowing the information retrieved from the black box she admitted she may have been speeding. There were no known defects in her vehicle.

Broughton admitted she was charged with misdemeanor vehicular manslaughter. She agreed that she "signed a document" but initially denied that she plead guilty. She was represented by counsel in the civil case at the time and in the criminal case she had a different attorney. Broughton then changed her testimony and admitted that she plead guilty to vehicular manslaughter; she was placed on probation and paid a fine. She signed the plea agreement, which included an acknowledgment that she was aware of her rights and the significance of her guilty plea. She initialed the charge of Penal Code section 192, subdivision (c)(2).

On cross-examination, Broughton testified she had retired in 2011; she retired to Laughlin. On the day of the accident, she was well rested. Her Impala was in good condition. She was not on her cellular telephone and she did not have any impairments. She suffered a head injury and did not have a complete recollection of the accident.

The train tracks did not cause her to leave the road. She had slowed to 50 to 60 mph to go over the tracks but sped up after crossing them. She had no distractions before

the tire went off the road. She felt like something grabbed the front right tire and pulled at her tire. She had no idea if this was because she was already off the roadway or was pulled off the roadway. She immediately turned the wheel to the left and accelerated. She may have been speeding in order to accelerate off the side of the road. She was certain at that point her car spun around. She never saw the Maderos' vehicle before her car struck it.

After Broughton struck the Maderos' vehicle, her car spun around and the airbags deployed. She had blood on her face. Her husband immediately exited the car. She was airlifted to a hospital.

The criminal case against her was filed in August 2011. She was instructed by her criminal lawyer not to speak with the Maderos. The court case was in Barstow. Broughton explained she was originally offered a nolo contendre plea. However, the Maderos appeared in court and she was offered only a guilty plea. She agreed to the guilty plea because it seemed important to the Maderos, she did not feel she would get a fair trial, and she no longer wanted to make the seven-hour drive from her home to Barstow. She was sorry the accident occurred.

2. *DEFENDANT'S CASE*

Dr. Daniel Kaplan was an orthopedic surgeon; he was retained as an expert by Broughton. He contested much of the future treatment requirements for Eloisa that had been recommended by the Maderos' experts. He never personally examined Eloisa. No other witnesses were called by Broughton.

DISCUSSION

A. COMPARATIVE FAULT OF PLAINTIFF INSTRUCTION

Broughton contends on appeal that evidence was presented in the trial court to support an instruction on comparative fault of plaintiff (CACI No. 405). She insists that a vital part of her case was the failure of Eloisa to use reasonable care in the operation of her vehicle by failing to apply the brakes prior to the crash.

1. *ADDITIONAL FACTUAL HISTORY*

After the presentation of evidence, the trial court addressed the jury instructions. Broughton had proposed the following instruction, based on CACI No. 405 be given: "[Broughton] claims that [Eloisa]'s own negligence contributed to her harm. To succeed on this claim, [Broughton], must prove both of the following: [¶] 1. That [Eloisa] was negligent; and [¶] 2. That [Eloisa]'s negligence was a substantial factor in causing her harm. [¶] If [Broughton] provides the above, [Eloisa]'s damages are reduced by your determination of the percentage of [Eloisa]'s responsibility."

The trial court first noted, in addition to the instruction, that Broughton was asking for a special verdict on Eloisa's negligence but there was "nothing on the record that would support that." Broughton's counsel argued that the CHP officers had testified that there was no evidence of braking on the roadway. Further, no one in the Maderos' vehicle recalled Eloisa braking. Further, the accident reconstruction expert who testified for the Maderos had talked about perception and reaction time. The expert testified that one second was a reasonable perception and reaction time. This could include braking. Broughton's counsel contended that "the failure to brake under the circumstances is

something that the jury could find to be comparative." Additionally, it was commonly argued in automobile accident cases that a driver should be able to avoid anything that is going on in front of them.

The trial court responded first as to the request for a verdict form. "The only thing from what I could see that we have here is a defensive maneuver. Whether or not brakes were applied under the circumstances of the evidence here presented with the car crossing the center divider in the way that it did in milliseconds, I don't see that as a negligent act. It was a defensive maneuver, at best, she was trying to execute. I'm not going to allow that." In addition, the trial court refused to give Broughton's proposed instruction.

2. *ANALYSIS*

"When contributory negligence is alleged as a defense, a trial court must instruct on that issue if there is substantial evidence to support it. [Citations.] The requisite standard cannot be met by mere speculation or conjecture. [Citation.] The burden of proving contributory negligence rests upon a defendant." (*Drust v. Drust* (1980) 113 Cal.App.3d 1, 6, fn. omitted.) It is error to give an instruction on contributory negligence where there is no evidence to support it. (*Simmons v. Wexler* (1979) 94 Cal.App.3d 1007, 1012 (*Simmons*).)

In *Simmons,* the plaintiff was driving to work on a motorcycle. It was during the day and he did not have his headlamp on. He was driving through a four-way intersection when he was struck by another car that rolled through the stop sign. (*Simmons, supra,* 94 Cal.App.3d at pp. 1010-1011.) The defendant on appeal contended

the trial court should have instructed the jury on contributory negligence based on (1) plaintiff's failure to look left or right when he crossed through the intersection; and (2) for failing to have on his headlamp. (*Ibid.*)

The appellate court first rejected that the instruction was proper based on whether the plaintiff looked left and right while proceeding through the intersection. It held, "[L]iability may not be based on a driver's failure to look if the collision is not the proximate result of such failure and if it could not have been avoided even if the driver had looked (as where the other vehicle comes into his path suddenly and without warning). [Citation.] Although a driver's contributory negligence in failing to see a vehicle ahead of him in time to avoid a collision is normally a question of fact [citation] a motorist on a highway protected by stop signs may initially assume that vehicles on intersecting streets will not be driven on the highway into the path of the vehicles on the highway so close as to constitute an immediate hazard. [Citation.] A person lawfully and carefully using the street has a right to assume that all other persons using the street will also exercise ordinary care and caution, and he is not usually bound to anticipate negligence on their part. [Citation.] Therefore, lack of direct evidence as to whether plaintiff did or did not look to the right and left would not in and of itself be evidence of contributory negligence" (*Simmons*, *supra,* 94 Cal.App.3d at p. 1013.)

The *Simmons* court also rejected that the lack of use of a headlamp required a contributory negligence instruction. "There is no showing that failure to use the motorcycle headlamp contributed to the accident or was proximately related to it. Contributory negligence is a defense if it is causally connected with the injury.

[Citation.] Here, there isn't the slightest suggestion that lack of a headlight was causally related to the accident. Visibility was good, the weather was clear, streets were dry and there was no other traffic around to distract defendant from seeing plaintiff. Plaintiff was where he had every lawful right to be. The accident was caused by defendant not observing the duty to stop at the stop sign, and there is nothing to suggest that defendant would have chosen to obey the law and stop at the stop sign if plaintiff had used his headlight." (*Simmons, supra*, 94 Cal.App.3d at p. 1014.)

"Appellate courts apply a de novo standard of review when determining whether the trial court's jury instructions were proper because the propriety of a jury instruction is a question of law." (*Harb v. City of Bakersfield* (2015) 233 Cal.App.4th 606, 617.)

The evidence here established Eloisa was driving the speed limit in her lane and was not violating any Vehicle Code laws. Manning, the Maderos' expert, testified that Broughton veered off the highway onto the shoulder. According to the black box in her car and the measurements by the CHP, the time between Broughton going off the road and impacting the minivan was just 1.3 seconds. Manning testified that the normal perception time was 1.5 seconds. Based on this testimony, Eloisa had no time to react by applying her brakes. The trial court properly rejected that the evidence established Eloisa had time to brake.

While counsel for Broughton asked Manning several questions insinuating that Eloisa had time to brake prior to the crash, Manning never testified as such. Manning stated that had Broughton been traveling at 65 mph, reaction time would have been increased to 1.6 seconds. However, Manning never stated that he believed she was going

65 mph. He trusted the black box information, which estimated Broughton's speed at 71 to 76 mph. Further, he stated that it would have been unclear to Eloisa what hazard existed and what maneuver was appropriate. Even if Eloisa had seen Broughton veer off the highway to the right, she could not anticipate Broughton would overcorrect and come into her lane. Once that began, based on the undisputed testimony of Manning, Eloisa would not have had enough time to brake. There simply is no evidence of Eloisa's negligence.

Moreover, Eloisa did attempt to take evasive action by taking her foot off the gas and steering to the right. Broughton overlooks this evidence.

Most importantly, there was a dearth of evidence of how Eloisa braking would have somehow avoided the crash, that the severity of Eloisa's injuries would have been diminished, or DJ would have survived the accident. Similar to *Simmons,* where there was no evidence that had the plaintiff turned on the headlamp on the motorcycle the accident would have been avoided, here there was no evidence as to what would have occurred if Eloisa had applied the brakes. Broughton's pure speculation—that Eloisa should have applied the brakes—without any evidence of whether this would have changed the circumstances of the accident does not support an instruction on comparative negligence.

Broughton faults the trial court for not giving the comparative negligence instruction because Eloisa failed to brake, slow down, or attempt evasive maneuvers as a reasonably prudent person would do in the same situation. However, Eloisa did take action. Baca was adamant that Eloisa took her foot off the gas. Both Salas and Baca

testified that Eloisa turned to veer out of the way of Broughton's oncoming vehicle. The record simply does not support that Eloisa did nothing in the face of Broughton's oncoming vehicle.

Without any citation to the record, Broughton contends CHP Officer Praznik indicated that drivers should slow down in "such an area." Eloisa should have been aware of the curve in the road and slowed down. We will not search the record to find such evidence. Moreover, Broughton's counsel argued to the jury that the posted speed limit for the curve was 65 mph and that she did not have to slow down while driving through the curve. It follows that if counsel's argument was accepted by the jury, Eloisa did not need to slow down.

Even if the trial court erred by refusing to give the instruction, reversal is not required. "[T]here is no rule of automatic reversal or 'inherent' prejudice applicable to any category of civil instructional error, whether of commission or omission. A judgment may not be reversed for instructional error in a civil case 'unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' " (*Soule v. General Motors Corporation* (1994) 8 Cal.4th 548, 580.) "Instructional error in a civil case is prejudicial 'where it seems probable' that the error 'prejudicially affected the verdict.' " (*Ibid.*)

As noted, Eloisa did try to take evasive action by steering to the right and taking her foot off the gas. There was no evidence presented that braking would have lessened the injuries or that the accident would not have occurred. As such, even had the jury

been instructed on contributory negligence, it would not have found that Eloisa was a contributing cause of her injuries or DJ's death.

B. ADMISSION OF VEHICULAR MANSLAUGHTER PLEA

Broughton insists in her appellant's opening brief that the trial court erred by instructing the jury with the Maderos' special instruction No. 1 on the import of Broughton's guilty plea to misdemeanor vehicular manslaughter. However, in the reply brief, Broughton concedes she was not attacking the admission of her guilty plea and appears to recognize that the instruction properly stated the law. Rather, she insists that the instruction was prejudicial because she was not allowed to counter the evidence by arguing Eloisa's contributory negligence.

1. *ADDITIONAL FACTUAL HISTORY*

Prior to trial, the parties met with the trial court regarding motions in limine filed by Broughton. Relevant here, Broughton filed motion in limine No. 2 seeking to exclude evidence of Broughton's plea of guilty to a misdemeanor charge of vehicular manslaughter (Pen. Code, § 192, subd. (c)(2)) arising out of the accident. She argued that the facts of the guilty plea and the nature of the charges had no relevance to the issues in the civil case. The disclosure would be highly prejudicial to Broughton.

The Maderos filed opposition to motion in limine No. 2. They argued the violation of Penal Code section 192, subdivision (c)(2), was admissible pursuant to Evidence Code section 669, which provides that the failure of a person to exercise due care is presumed when he or she violates a statute and causes the death of or injury to another person. The Maderos argued Broughton could not use Evidence Code section

352 to exclude the evidence. The Maderos additionally argued case law supported that when a party pleads guilty in a criminal case, it may be admitted as an admission in a subsequent civil case. Finally, the Maderos argued that collateral estoppel principles precluded Broughton from denying or relitigating liability.

Broughton filed a response contending the principles of collateral estoppel did not apply because she did not have a trial, but plead guilty to a violation of Penal Code section 192. She only plead guilty because she was tired of driving to the courthouse, and defending the action was more trouble than the resulting penalty.

The trial court indicated it had read motion in limine No. 2 and the responses. The parties had discussed the issue off the record. The guilty plea was admissible as an admission referring to Evidence Code section 1220. However, the trial court rejected that Broughton was estopped from relitigating negligence. The trial court concluded that a misdemeanor guilty plea did not have a collateral estoppel effect. It was admissible as an admission against interest. Further, it did not have to be excluded under Evidence Code section 352. Broughton could submit evidence to the jury as to the reasons she plead guilty to show why she did not proceed to trial on the issue. There was no further argument by either party.

After the evidence was presented, the jury was instructed with the Maderos' special instruction No. 1 as follows: "You may treat Defendant Mercedes Broughton's plea of guilty to misdemeanor vehicular manslaughter as an admission that she committed that offense. Misdemeanor vehicular manslaughter has four elements. One, while driving a vehicle, the defendant committed a misdemeanor or infraction . . . or a

lawful act in an unlawful manner; two, the misdemeanor or infraction or otherwise lawful act was dangerous to human life under the circumstances of its commission; three, the defendant committed the misdemeanor or infraction or otherwise lawful act with ordinary negligence; and four, the misdemeanor or infraction or otherwise lawful act caused the death of another person. [¶] Defendant Broughton's guilty plea is not necessarily conclusive evidence that she committed this offense, and its weight and significance are for you to decide based on the totality of the circumstances."

2. *ANALYSIS*

Initially, Broughton concedes that her guilty plea was admissible. Moreover, we have already determined that the trial court did not err by refusing to instruct the jury on contributory negligence. Since she was not entitled to such instruction, we cannot conclude that it was unfair or prejudicial to Broughton that she could not argue contributory or comparative negligence.

Moreover, the instruction properly stated the law. CALCRIM No. 593 provides in part: "To prove that the defendant is guilty of vehicular manslaughter with ordinary negligence, the People must prove that: [¶] 1. While (driving a vehicle/operating a vessel), the defendant committed (a misdemeanor[,]/ [or] an infraction/ [or] a lawful act in an unlawful manner); [¶] 2. The (misdemeanor[,]/ [or] infraction/ [or] otherwise lawful act) was dangerous to human life under the circumstances of its commission; [¶] 3. The defendant committed the (misdemeanor[,]/ [or] infraction/ [or] otherwise lawful act) with ordinary negligence; [¶] AND [¶] 4. The (misdemeanor[,]/ [or] infraction/ [or] otherwise lawful act) caused the death of another person."

The instruction given here properly tracked the law as stated in CALCRIM No. 593. The instruction further provided that the jury could treat Broughton's plea of guilty to misdemeanor vehicular manslaughter as an admission that she committed the elements of that offense, not that she was necessarily negligent in the civil case. Further, the jury was admonished it could not conclude she was negligent in this case based solely on the evidence of her guilty plea but rather based on the totality of the circumstances. The trial court did not err by giving the instruction.

DISPOSITION

The judgment is affirmed. As the prevailing parties, respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
Acting P. J.

We concur:

SLOUGH
J.

RAPHAEL
J.